STATE OF MICHIGAN

COURT OF APPEALS

FRANK J. NOA,

Plaintiff-Appellee,

v

AGATHA C. NOA, ESTATE OF MICHAEL J. NOA and M&M ENTERPRIZES, INC.,

Defendants-Appellants.

UNPUBLISHED
October 13, 2005

No. 255310
Otsego Circuit Court
LC No. 03-010202-CH

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendants Agatha Noa ("Mrs. Noa"), the Estate of Michael Noa ("Michael"), and M&M Enterprizes, Inc. ("M&M") appeal as of right the amended judgment issued by the trial court following a bench trial in this quiet title action involving a land contract and various deeds, and in which the court ruled that plaintiff Frank Noa ("Frank") and Mrs. Noa own the property at issue as tenants in common, subject to a life estate reserved by Mrs. Noa. The trial court denied defendants' motions to amend the judgment and for new trial, as well as defendants' motion for reconsideration. Defendants raise three issues on appeal, arguing that the status of M&M is irrelevant to the continuing validity of the land contract, that the land contract was not abandoned, and that defendants are entitled to specific performance of the land contract, thereby requiring Frank to convey his interest in the title. We affirm.

This litigation arises out of a longstanding dispute between Frank and his mother Mrs. Noa regarding the ownership of a track of land previously owned solely by Mrs. Noa. On July 9, 1990, Mrs. Noa quitclaimed her land to her sons Frank and Michael as joint tenants, reserving a life estate for herself. On April 21, 1994, Frank and Michael granted Mrs. Noa a limited power of attorney. During the following years, Mrs. Noa and Frank became estranged and as a result, Mrs. Noa decided to disinherit Frank. In order to divest Frank of his property interest, Mrs. Noa used the limited power of attorney to sell the subject property on land contract to M&M.[1]

[1] This Court previously held that this power of attorney permitted Mrs. Noa to sell the property and to use the proceeds for her own benefit. *Noa v M&M Enterprizes, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2001 (Docket No. 218819).

M&M was a Michigan corporation equally owned by Michael and his attorney Murray Blum.[2] Four days after M&M entered into the land contract, M&M quitclaimed its interest in the property to Michael.

Realizing the consequences of his actions, on February 11, 1998, Frank signed and recorded a "Notice of Revocation of Power of Attorney." On June 4, 2001, Mrs. Noa, using the limited power of attorney, attempted to convey to herself by warranty deed Michael's and Frank's interests in the property. Mrs. Noa had not learned of Frank's revocation. Subsequently, on July 9, 2001, Mrs. Noa quitclaimed the property to Michael, who on August 8, 2002, quitclaimed it back to Mrs. Noa.[3] Michael died shortly thereafter. On January 29, 2004, Frank brought an action to quiet title to a one-half interest in the property, arguing that the land contract was void by virtue of M&M's dissolution. The trial court ruled for Frank but on different grounds. The court held that Mrs. Noa and Michael abandoned the land contract in light of the various transactions and their conduct. The trial court stated:

> [T]he Court accepts as correct Mr. Bebble's[4] assessment of where title lies in this property at the present time based on the chain of title. And his assessment is that Mrs. Noa owns 50 percent of the property, and Mr. Frank Noa owns 50 percent of the property subject to Mrs. Noa's life estate.
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> The land contract was a land contract from Mrs. Noa to M and M followed by a quit claim deed of the corporate interest to Michael, and the only thing the corporation had to convey was its equitable interest in a land contract. I think that the record reflects an understanding chargeable to [Mrs. Noa] that the land contract is no longer of any force or effect or intended to have any effect as a result of all of the subsequent transactions commencing in 2001. *The parties have moved past the contract. It's treated by them as non-existent and they set off on a course of deeds intending to exclude Frank without recognition of the fact that he had revoked her power to do it.* [Emphasis added.]

In a bench trial, this Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). When reviewing an equitable determination reached by a trial court, this Court reviews the trial court's conclusion de novo, but the trial court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App

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[2] It is undisputed that M&M was formed for the sole purpose of acquiring the property at issue and divesting Frank of his interest.

[3] There were other conveyances, as well as mortgages, relative to the property, but those transactions are not relevant for purposes of our opinion.

[4] Bebble is an attorney and the owner of Alpine Title Company.

57, 67; 577 NW2d 150 (1998); see also *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001)(quiet title actions are equitable and the court's holdings thereon are reviewed de novo). In general, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The rights of a vendee in a land contract can be lost by abandonment. *Dundas v Foster*, 281 Mich 117, 120; 274 NW 731 (1937); see also 1 Cameron, Michigan Real Property Law (3rd ed), § 16.13, p 618. A contract is abandoned where the vendee "'positively and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, or *where by his conduct he clearly shows an intention to abandon the contract*.'" *Collins v Collins*, 348 Mich 320, 327; 83 NW2d 213 (1957)(emphasis added; internal quotations deleted), quoting *Dundas, supra* at 120, quoting 66 CJ, Vendor and Purchaser, § 295, pp 731-732; see also *Gaval v Wojtowycz*, 13 Mich App 504, 511; 164 NW2d 724 (1968). Conduct that is inconsistent with the continuance of a land contract constitutes rescission by abandonment, and the relinquishment or abandonment of the contract need not be proven by a specific writing as such may be deduced by the circumstances and course of conduct. *Annett v Stout*, 322 Mich 457, 462; 34 NW2d 42 (1948). Generally, whether the conduct of the vendee amounts to an abandonment of the contract is a question for the trier of fact. *Tiley v Chapman*, 320 Mich 173, 175; 30 NW2d 824 (1948).

In *Collins, supra* at 327, our Supreme Court refused to find abandonment of a land contract where payments were in arrears but the vendee had paid all real estate taxes, improved and occupied the property, and kept it insured in the vendee's name. Conversely, where payments on a land contract were not made for over twenty-one years, the land was vacant, the land was not accounted for as an asset in a vendee's estate during probate, and where the vendee had not previously claimed a land contract interest, our Supreme Court held that the land contract was abandoned. *Houghton v Collins*, 344 Mich 175; 73 NW2d 208 (1955). Moreover, in *Annett, supra* at 466-467, our Supreme Court held that a vendee's return of the land contract to the vendor where the vendee could no longer make payments manifested an intent to surrender the vendee's interest in the land.

In the present case, the trial court concluded, "[T]he record reflects an understanding chargeable to [Mrs. Noa] that the land contract is no longer in any force or effect . . . as a result of the subsequent transactions commencing in 2001." The trial judge, sitting as the trier of fact, reasoned that these subsequent transactions between Mrs. Noa and Michael manifested a clear intent to abandon the land contract. At a rather lengthy hearing on defendants' motions to amend the judgment and for new trial, the parties and the court proceeded to carefully review the real estate transactions that occurred over the years, placing most of the emphasis on the June 4, 2001, warranty deed executed by Mrs. Noa on behalf of Michael and Frank via the limited power of attorney, which attempted to convey their property interests to Mrs. Noa. Setting aside Frank's argument that the M&M conveyance to Michael was invalid, and assuming its validity, the parties and the court agreed that, prior to the execution of the June 2001 warranty deed, Michael and Frank held legal title to the property subject to Mrs. Noa's life estate (vested

remainders) and that the two siblings were land contract vendors, with Michael being the land contract vendee. The trial court pointed out, correctly, that the effect of the warranty deed was meaningless as to Frank's interest because he had previously revoked the power of attorney and that the effect of the warranty deed as to Michael, who had not revoked the power of attorney, was to give any interest Michael had in the property, including the land contract vendee interest, back to his mother, which merged with the legal interest she acquired from Michael per the deed, resulting in extinguishment of the land contract and any vendee interest. The trial court concluded, "So, there is no contract, anymore." Counsel for defendants then focused on an affidavit by the attorney who drafted the June 2001 warranty deed, which averred that the sole purpose of the deed was to make Mrs. Noa the vendor on the outstanding land contract, but not disturb the vendee's rights under the contract. However, neither the affidavit, nor the testimony of the affirmant, were presented at trial and cannot be considered. Moreover, it conflicts with Mrs. Noa's testimony that it was her belief that the land contract had been satisfied in light of the language in this Court's earlier opinion and the trial court's opinion in a previous action filed by Frank. We note that there is no evidence that a warranty deed was executed by Frank or even sought from Frank that would have conveyed to Michael the property on the basis that he had fulfilled the land contract. When defendants began raising issues of res judicata and law of the case, the trial court stated that everything changed when the June 2001 warranty deed was executed and recorded, thereby extinguishing the land contract and giving rise to Frank's ability to initiate the quiet title action. Because of the change in facts, i.e., execution of the June 2001 warranty deed, we agree with the trial court's assessment.[5]

What we are left with at the time of the June 2001 warranty deed is Mrs. Noa, apparently believing that the land contract was fulfilled, conveying to herself what was thought to be Michael's single, legal interest in the property.[6] But Michael still had a land contract vendee interest as Frank had never signed a deed giving Michael a legal interest in the property by virtue of satisfaction of the land contract, and nothing in this Court's prior decision nor the previous ruling of the trial court can be read so broadly as to suggest that the land contract had been fulfilled and that Michael was thus entitled to absolute legal title to a 100% interest in the property. There was no testimony from Mrs. Noa indicating that Michael had satisfied or fulfilled the land contract, independent of her reliance on the court rulings for such a proposition. Therefore, when Mrs. Noa executed the warranty deed, not only was Michael's one-half interest in the legal title passed, but also his equitable interest as land contract vendee, and this, in our opinion, resulted in extinguishment, relinquishment, or abandonment of the land contract. The facts and circumstances presented in this case evidence an abandonment and an extinguishment

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[5] Res judicata bars relitigation of claims predicated on the same transaction or events as a prior action, and where the new action involves facts and events separate from those involved previously, the doctrine of res judicata is inapplicable. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). The law of the case doctrine controls only where the facts have remained materially the same. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

[6] It is clear from our review of the record that Mrs. Noa did not quite understand all of the legal principles and ramifications relative to the deeds and the land contract.

of the land contract. We have considered and we reject all of defendants' arguments and conclude that the trial court did not commit error. Accordingly, and after consideration of subsequent deeds, Frank and Mrs. Noa own the property as tenants in common, subject to a life estate reserved by Mrs. Noa.

Defendants raise two more issues on appeal. First, defendants contend that the status of M&M did not affect the validity of the contract because M&M transferred its interest to Michael before M&M's dissolution. However, we need not address this issue as it is not determinative of the outcome of this case because the issue discussed above is dispositive. Second, defendants contend that following this Court's prior decision they could have filed their own quiet title action to force a conveyance of the property and, that, as a result, they are now entitled to specific performance. Defendants' argument is based on the misunderstanding that this Court held that the land contract was fulfilled. As previously discussed, that was not this Court's holding. While we need not decide whether they could have pursued such relief or not, the facts remain that they did not file such an action. Mrs. Noa and Michael acted as if the land contract did not exist, and their conduct evidenced an intent to abandon or relinquish the contract.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy